Supreme Court, U.S.
FILED

NOV 10 2010

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No. 10-641

In the

Supreme Court of the United States

Kristina Powers,

Petitioner,

v.

James Freihammer and Calise Freihammer, individually and on behalf of their children,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Kristina J. Powers
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Petitioner, Pro se

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QUESTION PRESENTED

1. Whether a judge in the state of Minnesota can act as an audio forensic expert witness on behalf of one party in a quasi-criminal court proceeding over which the judge is presiding.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Kristina Powers; James Freihammer and Calise Freihammer, individually and on behalf of their children

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 6

CONCLUSION..... 15

TABLE OF AUTHORITIES

FEDERAL CASES

Quercia v. United States,
289 U.S. 466 (1933).....1, 6, 13, 14

In Re Murchison,
349 U.S. 133, 136 (1955).....1, 6, 7

Tyler v. Swenson,
427 F. 2d. 412, 415 (8th Cir. 1970).....9, 14

Lepper v. United States,
233 F. 227, 230 (4th Cir. 1916) (concurring opinion).....9

Kennedy v. Great Atlantic & Pacific Tea Co.,
551 F. 2d. 593 (5th Cir. 1977)..... 5

STATE CASES

Bradley v. The State of Texas on the Relation of Dale White, 42 Tex. Sup. Ct. J. 513 (1999).....8

State v. Sandquist,
146 Minn. 322, 178 N.W. 883 (1920).....8

Dunham v. Roer,
708 N.W.2d 552 (Minn. Ct. App. 2006)..... 15

FEDERAL STATUTES

Fourteenth Amendment to the United States Constitution.....1, 6, 15

STATE STATUTES

Minn. Stat. § 609.748.....1

Minn. Stat. § 609.63, Subd. 2.....4

OTHER AUTHORITY

Minnesota Rule of Evidence 605.....1, 6, 8, 15

Annot. 157 A.L.R. 315 (1945).....9

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the Minnesota Court of Appeals, which affirmed the judgment of the District Court, Wabasha County, Minnesota, and which was denied review by the Minnesota Supreme Court. Specifically, Petitioner prays that a Writ of Certiorari be issued to review the affirmation of a presiding district court judge testifying as an audio forensic expert witness on behalf of the Respondents during the quasi-criminal harassment restraining order hearing pursuant to Minn. Stat. § 609.748. Petitioner argues that a presiding judge cannot choose to exclude one party's expert witness and then take the place of that expert witness and personally make a contrary forensic analysis on behalf of the opposing party in the proceeding. This unprecedented display of disregard for due process under the Fourteenth Amendment of the United States Constitution and the abuse of the sanctity of the judicial office is appalling and completely ignores the prior rulings of this Court in *Quercia v. United States,* 289 U.S. 466 (1933); *In Re Murchison,* 349 U.S. 133, 136 (1955); prior holdings of the Minnesota Supreme Court; the Minnesota Rules of Evidence; and the Code of Judicial Conduct. Such an action by a higher court of the State of Minnesota makes this case of considerable federal importance, as the attitude displayed in this case will no doubt be repeated and more judges will be allowed to testify as forensic experts and pass judgment on their own testimony against a party to a proceeding over which they are presiding, thus creating an outrageous disregard for the dignity and

required impartiality of the judicial office and the rule of law.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Ruling of the Wabasha County District Court, Third Judicial District, District of Minnesota, issued July 24, 2009; and Amended Order issued July 31, 2009, are reprinted in the appendix hereto, at A and B.

The unpublished Opinion of the Minnesota Court of Appeals, written by Lawrence Stauber and filed June 15, 2010, is reprinted in the appendix hereto, at C.

The Order from the Minnesota Supreme Court denying review of Petitioner's case, filed August 24, 2010, is reprinted in the appendix hereto, at E.

JURISDICTION

The jurisdiction of this Court to review the Opinion of the Minnesota Court of Appeals is invoked under 28 U.S.C. § 1257 (1).

The original action was commenced under the jurisdiction of the Wabasha County District Court by the filing and granting of a temporary harassment restraining order by Respondents on February 12, 2009. On July 24, 2009, Wabasha County District Court Judge Terrence Walters ruled from the bench and granted an extended harassment restraining order against Petitioner for a total of two and one-half years. Wabasha County District Court filed an Amended Order against Petitioner on July 31, 2009. The Opinion of the Minnesota Court of Appeals was

filed on June 15, 2010. The Order of the Minnesota Supreme Court denying review was filed on August 24, 2010. This Petition is, accordingly, timely under Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND OTHER AUTHORITY INVOLVED

Fourteenth Amendment to the United States Constitution

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Rule of Evidence 605

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point.

STATEMENT OF THE CASE

This is an appeal from the Judgment entered by the Minnesota Court of Appeals, upholding the rulings of the Wabasha County District Court in favor of the Respondents in a quasi-criminal harassment restraining order ("HRO") proceeding. The Minnesota Supreme Court denied review of the Judgment of the Court of Appeals.

The District Court case against Petitioner, age 19, was based on anonymous faxes, unsigned notes, paper copies of emails, never-seen "romantic fantasy" emails, and voicemails Respondent James Freihammer, age 42, claimed Petitioner sent. Petitioner restates here, with full force and effect, her Statement of the Case as outlined in her Petition for Further Review to the Minnesota Supreme Court and reprinted in the appendix hereto, at D.

The presiding District Court judge, Terrence M. Walters ("Judge Walters"), decided to exclude the telephonic testimony of Petitioner's out-of-state audio forensic expert witness at the HRO hearing. That expert would have testified that the voicemails submitted to court by the Respondents showed absolute indications of possible editing/altering, thus indicating Respondents may have committed a crime under Minn. Stat. § 609.63, Subd. 2. Instead of simply excluding the telephonic testimony, Judge Walters took the place of the expert and testified that, based on his own analysis with his naked ear in judge's chambers, the voicemails were authentic. Judge Walters went on to pass judgment on his own expert testimony, and he accused Petitioner of being "not credible," of being a "very troubled young woman," of committing perjury, and of offering testimony which he alleged to be without evidentiary support when she testified that while it was her voice on the voicemails, those audio files had been altered and were not authentic.

Petitioner's counsel raised this issue in Petitioner's Brief of Appellant to the Minnesota Court of Appeals, pages 22-23, and while that court

expressed great displeasure with the judge's conduct during oral arguments, it chose to simply ignore this in its Opinion. Petitioner then argued this matter to the Minnesota Supreme Court, stating that a presiding judge cannot act as a forensic expert witness on behalf of one party in a court proceeding, and that by doing so, the judge is abusing the prestige of the judicial office in order to unfairly advance the interests of another in violation of the Code of Judicial Conduct. The Minnesota Supreme Court denied review, thus leading Petitioner to appeal to this Court.

In responding to Petitioner's arguments to the Minnesota Supreme Court, Respondents refused to address the issues raised by Petitioner and instead indicated they were confused and thought that Petitioner was arguing that Judge Walters abused his discretion by choosing to simply exclude telephonic testimony. The rest of the Respondents' response consisted of answers to questions that Petitioner did not raise to the Minnesota Supreme Court and also the false application of the Appellate Rules of Civil Procedure concerning what automatically constitutes the record on appeal from district court. Notably, however, Respondents argued that the Minnesota Supreme Court does not have any jurisdiction over judges who have engaged in misconduct. Higher courts have held judges and other applicable officers of the court to the Code of Judicial Conduct in past cases when they have testified on behalf of one party in a court proceeding in which they were involved, as demonstrated by *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F. 2d. 593 (5th Cir. 1977).

While Petitioner's counsel did not specifically raise due process violations in connection with Judge Walters' conduct as an expert witness, Minnesota Rule of Evidence 605 clearly states that, "No objection need be made in order to preserve this point." (*Please note* Minnesota Rule of Evidence 605 is identical to Federal Rule of Evidence 605.) Objections have been raised since this case was first appealed, and since this issue would have been preserved even without those objections, Petitioner is allowed to argue due process violations under the Fourteenth Amendment of the Constitution on appeal to this Court.

REASONS FOR GRANTING CERTIORARI

This Court has long held that "In commenting upon testimony [a judge] may not assume the role of a witness." *Quercia v. United States,* 289 U.S. 466 (1933). In *re Murchison,* 349 U.S. 133, 136 (1955), this Court stated that,

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness....But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

This Court went on to say,

> In finding White [defendant/petitioner] guilty of contempt the trial judge said, 'There is one thing the record does not show, and that was

> Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand...Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record.' In answer to defense counsel's motion to strike these statements because they were not part of the original record the judge said, 'That is something...that wouldn't appear on the record, but it would be very evident to the court.' Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part of this impression, the accuracy of which could not be tested by adequate cross-examination.

This Court in *re Murchison* went on to describe the implications of a judge testifying as a witness to the defendant's personal behavior, and of that judge then presiding over his contempt hearing [emphasis added]: "...the result would be either that the defendant must be deprived of examining or cross-examining [the judge] or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant."

State and federal courts have adhered to the same standard, holding that a judge acting as a witness on behalf of one party in a proceeding he is presiding over constitutes a violation of due process.

Bradley v. The State of Texas on the Relation of Dale White, 42 Tex. Sup. Ct. J. 513 (1999), noted that, "Most cases that do involve judges testifying at the trial over which they are presiding are decided on due process grounds." *Bradley* gave as examples multiple state, federal, and United States Supreme Court cases which have held that "a judge testifying as a witness violates due process rights by creating a constitutionally intolerable appearance of partiality."

In Minnesota, the case *State v. Sandquist*, 146 Minn. 322, 178 N.W. 883 (1920) is used in the footnote to Minnesota Rule of Evidence 605 to show the position of the state's caselaw concerning judges playing the role of witnesses. In *Sandquist,* the Minnesota Supreme Court held as follows:

> The consensus of judicial opinion is that one cannot properly play the roles of presiding judge and witness simultaneously. The reasons are obvious....could [the judge] impartially decide upon the admissibility of his own testimony or weigh it against the testimony of another?...But the most cogent reason why a judge should not become a witness is that if he testifies it must necessarily be in behalf of one of the parties and against the other, and this tends to strongly influence the jury and to deprive the party against whom he testifies a fair and impartial trial. This and other reasons not necessary to enumerate have led the courts quite uniformly to condemn the practice.

The court in *Sandquist* then cited as examples no fewer than a dozen cases and authorities from across the country which had also condemned this practice.

See also Annot. 157 A.L.R. 315 (1945).

In *Tyler v. Swenson*, 427 F. 2d. 412, 415 (8th Cir. 1970), the 8th Circuit Court of Appeals stated (quoting *Lepper v. United States*, 233 F. 227, 230) (4th Cir. 1916) (concurring opinion),

> Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded as partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious.

In *Tyler v. Swenson*, the 8th Circuit Court of Appeals remanded the case back to District Court after concluding that the judge's behavior in this case denied the petitioner a "full and fair" hearing in accordance with constitutional standards. In doing so, the 8th Circuit noted,

> We thus make clear...that a trial judge is not to be disqualified simply because he is familiar with the proceedings and supplements the record with observations. Nor do the trial

> judge's supplemental statements into the record make him a material witness, unless he offers disputed and material testimony which is challenged by the petitioner. In the instant case it is particularly significant that the trial judge's recollection was the *only* testimony which refuted petitioner's claim....

In Petitioner's case, Judge Walters was presented with an offer of telephonic testimony on July 24, 2009, from a Texas audio forensic expert, Barry Dickey ("Dickey"), who had been retained by Petitioner to examine several duplicate CDs containing audios which Respondent James Freihammer contended Petitioner had left on his office voicemail machine. After conducting a forensic analysis, Dickey concluded that the alleged voicemail contained absolute indications of possible editing/altering.

This forensic conclusion gave serious doubt as to the credibility and authenticity of Respondent's entire case against Petitioner. If Respondent would alter an audio of Petitioner's voice in an attempt to provide tangible evidence of her alleged harassment of him, then Respondent's other evidence, such as the paper copies of emails, the anonymous faxes, the unsigned notes, etc., would immediately become suspect. Petitioner's testimony—that Respondent was accusing her of the behaviors that he had done to her during her employment—would have great credibility. Indeed, especially when Respondent claims Petitioner began harassing him on the very date she told him that he was not behaving appropriately towards her for a married man.

Judge Walters, upon request, was given the following offer of proof regarding the substance of Dickey's testimony on July 24, 2009 [HT. 239-240; emphasis added]:

> THE COURT: And, by way of an offer of proof, what would this witness's testimony consist of?
>
> MR. WEINER: Well, Mr. Dickey is an audio forensic expert who's testified in a litany of cases both state and federal, both civil and criminal all around the country. I have his curriculum vitae here. He would testify that he examined the audio recordings that are purported from Ms. Powers, and that they are completely inconsistent with authentic and original and unaltered recordings because of the characteristics of that recording.
>
> THE COURT: In what way are they inconsistent with an original recording? And I will advise you that I have listened to both recordings.
>
> MR. WEINER: Yes. Well, with modern technology, a person can edit or splice together other conversations or can computer generate certain things using a person's voice. Based on my conversations with Mr. Dickey, it is the constant pitch and spectral changes associated with the voice. It speeds up and slows down in a way that would be inconsistent with the way a normal recording would flow. And he also talks about continuous changes in overall DC

> offset because apparently there are other things that are going on in the room in the area, just the subtle sound interference that can only be picked up by computer, that seems as though these recordings were made at a different place. In other words, the person talking was in a different place than where these recordings were made.

Judge Walters decided not to allow telephonic testimony in this court proceeding, a discretionary decision which, for the purposes of this Petition, Petitioner, once again, is not arguing one way or the other. However, he gave this additional reason why he would not allow Dickey's testimony [HT. 240-241]:

> THE COURT: I listened very carefully to the exhibits in chambers, in quiet, and the -- there were no breaks, pauses, jumps, any of the things one would expect to hear in a spliced together, cobbled together recording. It was continuous; it was consistent. And so for that reason, in addition to the question of allowing the telephone testimony, the Court is going to deny the respondent's motion.

In his ruling from the bench, Judge Walters stated the following [HT. 319-320 and Petitioner's Appendix at A-3]:

> Further evidence belying the respondent's story can be found in Exhibit 3, the messages that were left on petitioner's phone in February. In those messages,

> respondent states that someone has hacked into her computer and filed a sexual harassment complaint against petitioner in her name. In long rambling monologs, the respondent tells petitioner that he never sexually harassed her, and someone else is trying to set him up, but that she can clear him of these false allegations. This is yet another piece of evidence which respondent knows she must somehow explain away if her story is to be believed. She says someone spliced together different conversations. That is not credible. This Court has listened to the recordings and they are continuous and uninterrupted. The voice on the recordings is unmistakably that of Ms. Powers.

As previously noted, Petitioner had testified that the voicemails were in her voice, and this was not disputed by her. Petitioner contended that the audio had been tampered with, which is why she wished to have Dickey testify in order to give credence to her claim.

Such statements by Judge Walters can be compared to *Quercia v. United States*, in which this Court reversed a federal District Court when the judge made the following statements to the jury regarding his view of the defendant's evidence and testimony:

> The court then charged the jury as follows: 'And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he

> wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.'

In *Quercia*, this Court, in addition to the statement noted on page 6 of this Petition, stated the following:

> Dealing with a mere mannerism of the accused in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury that 'wiping' one's hands while testifying was 'almost always an indication of lying.' Why it should be so, he was unable to say, but it was 'the fact.' He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the Government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

As in *Tyler v. Swenson*, the expert testimony provided by the judge was the only testimony which refuted Petitioner's claim and offer of proof regarding her expert's testimony, thus creating an outrageous violation of due process and a display of extreme prejudice and partiality in the courtroom. The judge weighed heavily on his supposed personal analysis of

these voicemails in his ruling, stating that Petitioner had lied under oath regarding her contention that they had been tampered with.

It is particularly damaging to Petitioner in this case, as Minnesota's harassment restraining order statute is "quasi-criminal" in nature (*Dunham v. Roer,* 708 N.W.2d 552, Minn. Ct. App. 2006) because Petitioner could go to jail for at least 36 hours without a warrant if the Respondents accused her of violating the restraining order. Petitioner would be placed in an unenviable position if the Respondents submitted another altered voicemail to the police or the court and requested that Petitioner be arrested for violating the restraining order. Given the unconstitutional actions of the local district court, which have been approved or else denied review by the highest appellate courts in Minnesota, Petitioner would have no recourse if and when the district court judge again uses only his naked ear to make a forensic determination on the authenticity of an audio recording or other piece of alleged evidence.

CONCLUSION

Sadly, the judicial process of the district court described in this petition scarcely resembles an American court of law. More disturbing, the judicial misconduct, extreme partiality, and denial of due process exhibited in the district court were affirmed by the Minnesota Court of Appeals and denied review by the Minnesota Supreme Court, thus abandoning all principles of the Fourteenth Amendment of the Federal Constitution; the Minnesota Rules of Evidence; the Code of Judicial

Conduct; and the litany of state, federal, and United States Supreme Court case law. The abandonment of these rules and laws can only open the floodgates for court findings and rulings that are by whim and personal opinion of the judge. Without the fairness and impartiality the rule of law provides, due process ceases to exist.

A judge acting as a witness on behalf of one party in a court proceeding he is presiding over and then passing judgment on his own testimony in determining the guilt or innocence of a party is clearly a perversion of judicial impartiality; then how much greater a spectacle is this district court judge taking the place of a forensic expert witness, a type of witness requiring specialized training, credentials, technical equipment, and experience. This stunning display of extreme prejudice by the district court judge betrays a flippant disdain for due process and the tenet of "justice for all" in Minnesota courts.

If this case is upheld, it presents grave concerns over the future conduct of Minnesota courts at all levels. Indeed, since the higher state courts in Minnesota have approved of a judge acting as a forensic expert witness, the ramifications for future court proceedings are alarming, where a judge's personal "finding" in lieu of the forensic expert testimony may acquit the guilty or condemn the innocent.

A judge acting as a witness in a court he is presiding over, where he must then pass judgment on his own testimony, is clearly constitutionally intolerable; and if this misbehavior is upheld, it will exponentially accelerate the erosion of trust Minnesota citizens

have in their judiciary. The United States Supreme Court has a duty to guide the Minnesota courts back to applying the laws and rules which guarantee its citizens due process, fair and impartial treatment in court, and to ensure that the higher Minnesota courts will provide swift remedy to any lower court found to be desecrating the law and due process, as was seen in this district court.

Respectfully Submitted,

Dated: November 5, 2010

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PRO SE

APPENDIX INDEX

Findings of Fact, Conclusions of Law, and Ruling of the Wabasha County District Court, Third Judicial District, District of Minnesota, issued from the bench on July 24, 2009 and reprinted from the District Court Transcript, pages 317-322.....A

Amended Order of the Wabasha County District Court, Third Judicial District, District of Minnesota, issued July 31, 2009.....B

Unpublished Opinion of the Minnesota Court of Appeals, written by Lawrence Stauber (June 15, 2010).....C

Petitioner's Petition for Further Review to the Minnesota Supreme Court, filed July 13, 2010.....D

Order of the Minnesota Supreme Court Denying Review (August 24, 2010).....E

* * *

(Resume at 1:15 p.m., July 24, 2009).

THE COURT: Before I read the decision, I will indicate that I am asking that all spectators remain seated and quiet until the decision is completed. If there is anyone who feels he or she cannot follow this rule, you should leave the courtroom now.

The threshold question in this case is whether the respondent sent the emails, faxes, and letters contained in Exhibit 1. The Court concludes that the evidence that respondent sent those communications is overwhelming. Respondent's testimony is that petitioner was powerfully attracted and infatuated with her; that he engaged in sexual harassment of her, and that she did not send the messages complained of. It is implied that there is some connection between the alleged sexual harassment and those messages. For reasons the Court will discuss, respondent's story is simply not credible.

In her sworn testimony, respondent said the petitioner was becoming "more and more blatantly inappropriate" toward her. She testified that on October 27th, she "told him he was becoming far to emotionally involved toward me for a married man". She testified that Principal Stern had to physically step between her and petitioner waving his arms to keep the petitioner away from the respondent. Principal Stern, however, testified that it was just the opposite. That it was the respondent whom he was trying to keep away from the petitioner.

Additionally, Diane Geary testified that respondent told her that petitioner was not taking

her phone calls and that Jon Stern was trying to keep them apart.

Further evidence belying respondent's trial testimony is the letter of December 8th. That letter says in part "I need to tell you what I have wanted to tell you for six months. I love you. There, I have finally said it. I have loved you for so long and I have tried to tell you this but was never brave enough, and I wasn't sure if it was reciprocated." Respondent knows she has to somehow explain away this letter. She does so by simply denying having written or delivering it. But Ann Meyer testified unequivocally that the letter was given to her by the respondent. Ms. Meyer identified her signature on the envelope indicating its receipt on December 8th. Additionally, Janice Tweedy, a handwriting expert of long-standing in this state, has testified that the handwriting in the letter is that of the respondent. To believe respondent's story, the Court would have to find that Ms. Meyer is lying and that Ms. Tweedy is completely wrong. The Court finds by overwhelming evidence that the December 8th letter was written and delivered to petitioner's office by the respondent.

Respondent testified that she described sexual harassment by petitioner in a December 8th phone conversation with Diane Geary. Ms. Geary, however, testified that when asked, respondent denied any actions by petitioner that would constitute sexual harassment. Once again, this testimony must be somehow explained away and respondent does so by simply alleging that Ms. Geary got it all wrong. This is not credible. A union rep would not mistake affirmative answers for negative ones to questions as critical as the ones posed by Ms. Geary to the

respondent. Ms. Geary made contemporaneous notes about the conversation, and later typed up those notes. Ms. Geary testified, I asked her some questions, if Jim had ever said anything inappropriate to her. She said, No. I asked her if he ever had touched her inappropriately. She said, No. I told her it doesn't really sound like harassment or sexual harassment.

Further evidence belying the respondent's story can be found in Exhibit 3, the messages that were left on petitioner's phone in February. In those messages, respondent states that someone has hacked into her computer and filed a sexual harassment complaint against petitioner in her name. In long rambling monologs, the respondent tells petitioner that he never sexually harassed her, and someone else is trying to set him up, but that she can clear him of these false allegations. This is yet another piece of evidence which respondent knows she must somehow explain away if her story is to be believed. She says someone spliced together different conversations. That is not credible. This Court has listened to the recordings and they are continuous and uninterrupted. The voice on the recordings is unmistakably that of Ms. Powers.

Respondent also sought to distance herself from the cell phone presumably to bolster her claim that she did not leave the various phone messages that are complained of. The cell phone, which she went to great lengths to describe as her parents' phone, contains a recorded message that begins by saying, This is Kristina.

Toni McMillin, far from corroborating

respondent's testimony that Mr. Freihammer blatantly followed her around showing inappropriate signs of affection, testified that she never saw Mr. Freihammer do anything to suggest a personal relationship. On the contrary, she testified to a conversation with Ms. Powers in which Ms. Powers feared she had cost herself a job by having sent an email to Mr. Freihammer proposing an affair. Respondent also told Ms. McMillin that Kathy Skold was not getting along with her husband and that Ms. Skold and Ms. Powers were both trying to get Mr. Freihammer. This, Ms. Skold denied. Ms. Skold was so concerned about the phone call she got from Ms. Powers that she took contemporaneous notes as had Diane Geary.

Reading all of the emails, faxes, and letters in Exhibit 1 in chronological order is like watching someone break down in front of your very eyes. From October to February, the messages become more and more obsessive and desperate. The picture that emerges from the evidence presented at this trial is one of a very troubled young woman. The respondent engaged in a pattern of sending communications which falsely suggested a romantic relationship between her and Mr. Freihammer, which falsely alleged suicidal ideation by Mr. Freihammer, and which falsely suggested sexual harassment by Mr. Freihammer. These communications were made to Mr. Freihammer himself, to his wife, to school staff, and to the school board. Such communications would have the obvious potential to adversely affect the petitioner's marriage and employment. The Court concludes this pattern of communication constitutes harassment and will extend the Harassment Restraining Order for two years.

We're in recess.

(Proceedings concluded.)

State of Minnesota **District Court**

County	County Judicial District:	Third
Wabasha	Court File Number:	79-CV-09-157
	Case Type:	**Harassment**

James Freihammer & Calise Freihammer Ind/Obo Minor Children
Petitioner(s)

vs.

Kristina Powers
Respondents(s)

Order After Harassment Hearing

X Harassment Restraining Order
_ Order for Dismissal
(Minn. Stat. §609.748)

This matter was heard by Terrence Judge, Judge of District Court, on July 24, 2009.

Appearances were made by:

__ Petitioner(s) X Petitioner's Attorney Marlene S. Garvis
X Respondent(s)
X Other(s) Phillip A. Gartner X Respondent's Attorney Timothy Deere Webb and Evan Hansen Weiner

Now, therefore, based upon the evidence adduced and upon all the files, records and proceedings herein, the court finds:

1. ___ The Respondent denies the allegations of the Petition but has no objection to the issuance of a

Restraining Order. The court makes no findings of harassment.

2. X There are reasonable grounds to believe that Respondent(s) has engaged in harassment of Petitioner(s) or the minor child(ren) or ward(s) of Petitioner.
3. ___ The allegations are not proven.

It is Ordered:

1. X Respondent(s) shall not harass
   X Petitioner X Petitioner(s) minor child(ren) or ward(s).
   List minor child(ren), wards included in this Petition: Cody, McKenzie, Karlee, Jaeden & Tayler Freihammer
2. X Respondent(s) shall have no contact with
   X Petitioner X Petitioner(s) minor child(ren) or ward(s).
3. X Respondent(s) shall stay away from where Petitioner resides. (address) 906 Pierce Avenue Wabasha, MN, or any future address.
4. X Respondent(s) shall stay away from Petitioner's place of employment located at 2113 Hiawatha Drive East Wabasha, MN.
5. __ This matter is dismissed.

Notice

The following conduct is a violation of this order if relief is granted: Any contact with Petitioner(s), direct or indirect and including any minor children included in this Order, any visits to the Petitioner(s), any phone

calls to the Petitioner(s), threats to the Petitioner(s), assaultive behavior to the Petitioner(s), calling the Petitioner(s) abusive names, damaging the Petitioner's property, breaking into and entering the Petitioner's residence, stealing property from the Petitioner(s), taking pictures of the Petitioner(s) without permission of the Petitioner(s), and _____.

6. This Order shall remain in effect until 7/24/11
Date (not to exceed two years)

7. The Court Administrator shall send a copy of this Order to the following law enforcement agency(s): Wabasha County Sheriff's Department and Wabasha Police Department. **Every police department and sheriff's office in Minnesota is responsible for enforcing this order.**

8. If Respondent is an organization, this order _____ shall / _____ shall not apply to all members of the organization.

9. Other: _____ _____

10. The sheriff of any county in the State of Minnesota shall perform the duties relating to serving this Order without charge to Petitioner.

Notice to Respondent

If relief is granted, a police officer shall arrest you without warrant and take you to jail if the police officer believes you have violated this Order and shall hold you in jail for at least 36 hours, excluding the day of

arrest, Sundays, and legal holidays, unless you are released by a judge or judicial officer.

Violation of this Order may be treated as a misdemeanor, gross misdemeanor, or felony. A misdemeanor violation may result in a sentence of up to 90 days in jail and/or a fine of $1000.00. Some repeat violations are gross misdemeanors that may result in a sentence of up to one year in jail and/or a $3,000.00 fine. Other violations are felonies that may result in a sentence of imprisonment for up five years and/or a fine of $10,000.00. A person who engage in a pattern of harassing conduct is guilty of a felony and may be sentenced to imprisonment for up to ten years a /or a fine of $20,000.00.

Dated: 7/31/09 s/_____
Judge of District Court

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1562

James Freihammer and Calise Freihammer, individually and on behalf of minor children,
petitioners,
Respondents,

vs.

Kristina Powers,
Appellant.

Filed June 15, 2010
Affirmed
Stauber, Judge

Wabasha County District Court
File No. 79CV09157

Marlene S. Garvis, Mark K. Hellie, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondents)

John R. Neve, Neve & Associates, P.L.L.C., Minneapolis, Minnesota; and

Timothy D. Webb, Timothy D. Webb, P.L.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the district court's imposition of a harassment restraining order pursuant to Minn. Stat. § 609.748 (2008), arguing that (1) the conduct alleged by respondents does not constitute harassment under the statute and (2) the district court abused its discretion by denying electronic discovery and excluding certain evidence from the hearing on the harassment restraining order. We affirm.

FACTS

In May 2006. at age 17, appellant Kristina Powers began working for the Wabasha-Kellogg School District as a student assistant in the child-care program. As a district employee, Powers became acquainted with respondent James Freihammer, the district superintendent. Freihammer was not Powers's direct supervisor. But during the course of her employment with the district, Powers met with Freihammer on many occasions, including a one-on-one meeting in July 2008 that lasted approximately three hours.

On October 26, 2008, Powers sent Freihammer an e-mail stating: "We are both currently in a situation in which we are becoming more and more emotionally involved with each other." The e-mail also referenced Freihammer getting a divorce, in which case Powers wrote that she would be interested in being in a relationship with Freihammer "based on [their] feelings toward each other right now." According to Freihammer, he was surprised by the e-mail and discussed its contents with his wife and Jon

Stern, the principal at the school.

The next day, Powers met with Freihammer twice. The first meeting occurred when Powers made an unannounced visit to Freihammer's office to discuss the e-mail she had sent him. According to Freihammer, Powers started talking about "vibes" that she thought Freihammer was sending. Powers also insisted that she and Freihammer meet again later in the day after she was done working. Freihammer subsequently met with Powers at 5:45 p.m. in the cafeteria where, he told Powers that he was not confused about his marriage and that her e-mail was "way off base." Freihammer also told Powers that he would still meet with her to resolve school-related issues, but those meetings would need to be in the presence of another person.

A few hours after meeting Freihammer in the cafeteria, Powers sent an e-mail to Freihammer. The e-mail again referenced their emotional involvement, noted that Powers had been told that Freihammer had "turned to other women in the past," and stated that Powers just wanted to help him. The next day, Powers e-mailed Freihammer again. This e-mail indicated that she thought Freihammer was depressed and suicidal. Powers also wrote that "I actually do care about you a great deal," and that "I only am trying to do everything in my power to help you and your family." (Emphasis omitted.)

In November and early December 2008, Powers sent Freihammer several e-mails related to a job opening in the school. On December 3, 2008, Powers e-mailed Freihammer requesting to meet with him and stating that she was still worried about him. The next day, Powers sent two e-mails to Freihammer asking if he knew who had been hired for the job opening. In the second e-mail, Powers

stated that she was still worried about Freihammer and indicated that Freihammer was the only person in the school whom she could trust.

On December 5, 2008, Freihammer attended a school-related meeting in the afternoon. Because he had received an e-mail from Powers earlier in the day stating that she would try to meet with him that afternoon, Freihammer asked Principal Stern to accompany him back to his office at the end of the meeting. When they arrived at Freihammer s office, Powers was sitting in a chair outside the office. Powers left abruptly when Freihammer and Principal Stern went into the office to get an extra chair for her.

After Powers left, Freihammer and Principal Stern discussed the situation in Freihammer's office. During their meeting, Powers called Freihammer twice, and Freihammer let both calls go to voicemail. Near the end of the meeting. Powers called the district bookkeeper, who transferred the call to Freihammer. Freihammer tried to end the phone call several times. Eventually, after about 15 or 20 minutes, Freihammer told Powers that he had to go, and he hung up the phone.

That evening, Powers sent Freihammer an e-mail stating that she had "'changed [her] mind'" and that she would not call or e-mail him anymore. But two days later, Powers sent another e-mail to Freihammer stating that she had been crying ever since he hung up on her and that she had been depressed since their conversation in October. Powers again concluded that this would be her "last note."

On December 8, 2008, Powers went to the district office and handed a sealed envelope to a secretary. Powers asked the secretary to deliver it to Freihammer, but not tell him who it was from. The

secretary complied, but in response to Freihammer's inquiry, she confirmed that Powers had delivered the envelope. With Principal Stern present, Freihammer opened the envelope, which contained a handwritten letter. In the letter, the author repeatedly professed her love for Freihammer and stated that she had wanted to convey this information to him for the past six months.

Shortly thereafter, Powers sent Freihammer an e-mail stating that she meant what she wrote in the letter. Powers also stated that she would try to meet with Freihammer one more time. Freihammer subsequently noticed that Powers was waiting to meet with him outside his office. Consequently, Freihammer contacted Principal Stern, who approached Powers and asked if he could help her. Powers replied that she had an appointment with Freihammer. Principal Stern told her that he knew that she did not have an appointment with Freihammer. He again asked if he could help Powers with any school-related matters. At that point, Powers left the office area. Later that afternoon, Powers resigned from her job with the district.

After resigning, Powers sent Freihammer an e-mail informing him that she had quit her job. Although she admitted that Freihammer "never touched [her]" or "made inappropriate remarks or said anything offensive to [her]," Powers accused him of emotionally manipulating her.

At some point in December 2008, Powers sent an e-mail to the chairman of the school board indicating that she was concerned about Freihammer's mental and emotional well-being. About a month later, Powers sent two facsimiles to the workplace of Freihammer's wife. The first facsimile claimed Freihammer was in love with

Powers. The second facsimile revealed the identity of a person who could be contacted to verify the contents of the first facsimile.

On January 24, 2009, Powers sent Freihammer an e-mail claiming that someone had hacked into her school e-mail account and sent Freihammer e-mails. A week later, Powers sent Freihammer four e-mails alleging that people in the district were trying to set him up. Powers again claimed that someone had accessed her school and personal e-mail accounts. The next day, Powers sent Freihammer another e-mail referencing Freihammer's job security. Powers sent another e-mail to Freihammer on February 7, 2009. This e-mail further discussed the alleged "complaints" against Freihammer, as well as Powers's emotional state.

On February 8, 2009, Powers sent Freihammer an e-mail requesting to know what e-mails Freihammer had received from her so that she could give the chairman of the school board the "correct information so he can get to the bottom of this outrageous move on behalf of apparently [Principal Stern] and [the] school attorney, trying to take you down in my name." Powers also wrote "please get ahold of... me ASAP by phone." Later that evening, Powers called Freihammer at his house. But as soon as Freihammer answered the telephone, he heard Powers state, "Jim, I'm trying to help you," prompting Freihammer to hang up the telephone. A few hours later, Powers left two lengthy messages on Freihammer's voicemail at school.

The next day, Powers called Freihammer's office three times, but hung up immediately after someone answered the telephone. Two days later, Freihammer received a package from Powers. The package contained a letter from the district's attorney

that was addressed to Powers. The letter requested an interview with Powers concerning a possible complaint she had against Freihammer. The package also contained a copy of a letter that Powers had sent to the chairman of the school board.

On February 12, 2009, Freihammer and his wife, individually and on behalf of their five children (collectively "respondents") petitioned for a temporary harassment restraining order (HRO) against Powers. Although the district court granted the petition, Powers sent Freihammer a handwritten letter making various accusations and threats before the HRO was served. Freihammer then had no further contact with Powers until the HRO hearing in June and July 2009.

At the hearing, Freihammer testified that Powers's conduct affected his work and ability to perform his job and was an unwanted invasion of his privacy. In contrast, Powers denied writing or sending the e-mails to Freihammer and denied sending the handwritten letters to Freihammer. After a three-day hearing, the district court concluded that Powers's "story is simply not credible," and "the evidence that [Powers] sent [the] communications is overwhelming." The district court issued a final HRO. This appeal followed.

DECISION I.

This court reviews a district court's grant of an HRO under an abuse-of-discretion standard. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). This court will set aside a district court's findings in support of its grant of an HRO only if they are clearly erroneous. *Id.* But statutory interpretation is a question of law, which this court reviews de novo. *Peterson v.*

Johnson, 755 N.W.2d 758,761 (Minn. App. 2008).

A district court may grant an HRO if "the court finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3). "Harassment" is defined in the statute as:

> a single incident of physical or sexual assault or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

Id., subd. 1(a)(1).

Powers argues that her communications and conduct, even if true, do not constitute harassment under the HRO statute. To support her claim, Powers cites *Dunham v. Roer*, in which this court stated that the focus of the HRO statute "is to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another." 708 N.W.2d 552, 566 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). In *Dunham*, this court went on to reject the argument that the HRO statute was unconstitutional because the statute "only regulates speech or conduct that constitutes 'fighting words." 'true threats,' or substantial invasions of one's privacy." *Id.*

Powers contends that because there is no allegation that her conduct constitutes "fighting words" or "true threats," the sole issue "is whether [her] alleged communications constitute a

'substantial invasion of [Freihammer's] privacy.'" Powers asserts that because there is no clear standard as to what constitutes a "substantial invasion of privacy," this court should look to Title VII, intentional-infliction-of-emotional-distress, and invasion-of-privacy cases to interpret the statutory definition of "harassment." Powers argues that because her actions are not actionable under these other theories of law, her communications and conduct do not constitute harassment within the meaning of the HRO statute. Therefore, Powers argues that the district court abused its discretion in granting the HRO.

We disagree. The laws pertaining to Title VII, intentional infliction of emotional distress, and invasion of privacy are neither analogous nor applicable to the HRO statute. Moreover, "[t]he determination of what constitutes an adequate factual basis for a harassment order is left to the discretion of the district courts." *Kush,* 683 N.W.2d at 846. It is sufficient if the district court finds the respondent's "actions had, or were intended to have, a substantial adverse effect on the safety, security, or privacy of [the petitioner]." *Id.* at 844. "The determination of whether certain conduct constitutes harassment may be judged from both an objective standard, when assessing the effect the conduct has on the typical victim, and a subjective standard, to the extent the court may determine the harasser's intent." *Id.* at 845.

In determining whether conduct constitutes harassment, this court has sufficiently defined the bounds of the district court's discretion. This court has held that inappropriate or argumentative statements alone do not constitute harassment. *Beach v. Jeschke,* 649 N.W.2d 502, 503 (Minn. App.

2002); *see also Witchell v. Witchell,* 606 N.W.2d 730, 732 (Minn. App. 2000) (reversing harassment restraining order because four argumentative comments written in a parenting notebook, although inappropriate, were not intended to adversely affect safety, security, or privacy). But a party's actions need not be obscene or vulgar to constitute harassing conduct. *Welsh v. Johnson,* 508 N.W.2d 212, 216 (Minn. App. 1993). And harassment may be found where the record shows two specific instances as well as other harassing conduct which, taken together, formed an ongoing situation. *See Kush,* 683 N.W.2d at 844 (stating that repeated incidents of intrusive or unwanted acts may be shown through specific harassing incidents in conjunction with general harassing conduct).

Here, the record reflects that in October 2008, Powers sent Freihammer an e-mail contemplating Powers's emotional involvement with Freihammer and addressing Freihammer's relationship with his wife. Freihammer subsequently met with Powers, told her that the e-mail was "way off base," and stated that he would still meet with Powers to resolve school-related issues but the meetings would need to be in the presence of another person. After this meeting, Powers sent Freihammer more than 15 e-mails over the course of the next few months. The e-mails addressed Powers's feelings toward Freihammer, as well as allegations that people in the district were trying to "take [him] down." In addition to the e-mails, Powers sent multiple handwritten letters to Freihammer, including a letter in which she expressed her love for Freihammer. Powers also repeatedly tried to meet with Freihammer in person and called his office and home phone on numerous occasions. She sent two facsimiles to Freihammer's

wife's place of employment, stating that Freihammer was in love with and having an affair with another woman. Freihammer testified that Powers's conduct affected his work and ability to perform his job and was an unwanted invasion of his privacy. When viewed objectively, Powers's communications and conduct constituted a substantial invasion of Freihammer's privacy.

Powers further argues that her communications and conduct do not constitute harassment because Freihammer never told Powers that her communications were unwelcome. But the record reflects that after Powers sent the initial e-mail to Freihammer addressing their purported emotional involvement, Freihammer met with Powers, told her the e-mail was "way off base," and informed her that any further meetings between them should be school-related and conducted in the presence of a third party. Although Freihammer did not discuss the e-mails with Powers further, subsequent e-mails and letters sent by Powers indicate that she knew that the communications were unwanted and that Freihammer was avoiding her. While we find it troublesome that the record does not show that Freihammer unequivocally directed Powers to stop her behavior, the evidence in the record demonstrates that the district court could reasonably conclude that Powers knew that her communications were unwanted and that they constituted harassing conduct. Therefore, the district court did not abuse its discretion in issuing the HRO.

II.

"The district court has broad discretion in granting or denying discovery requests." *Dunham*, 708 N.W.2d at 572. Similarly, evidentiary rulings are within the district court's discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). This court will not disturb a district court's evidentiary ruling unless the district court has erroneously interpreted the law or abused its discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). An appellate court will grant a new trial because of improper evidentiary rulings only if a party demonstrates prejudicial error. *Id.* at 46.

Powers argues that the district court abused its discretion by (1) declining to grant her request for production of electronic versions of e-mails rather than e-mails that were produced in paper form; (2) excluding the telephonic testimony of her computer and audio experts; and (3) excluding an audio recording purported to be between Powers and Freihammer. Powers argues that the cumulative effect of these errors denied her a fair hearing on the HRO.

A. Electronic discovery of e-mails

Powers issued a subpoena to the district seeking discovery of electronic copies of e-mails. The district moved to quash the subpoena, and the district court initially denied the motion to quash. The district subsequently moved for reconsideration and, following a hearing, the district court reversed its prior order and quashed the portion of the subpoena that requested electronic copies of the e-mails. Over Powers's objection, the district court allowed respondents to introduce paper copies of the

e-mails.

Powers argues that because she alleged that many of the e-mails were fabricated or altered, "the district court should have allowed Powers access to the electronic copies of the e-mails to give her an opportunity to prove that the e-mails had been fabricated or altered." Thus, Powers argues that the district court abused its discretion in declining to grant her request for production of the electronic versions of the e-mails.

To support her claim, Powers cites *White v. Graceland Coll. Ctr. for Prof I Dev. & Lifelong Learning Inc.,* in which a federal district court held that the defendants were required to produce electronic copies of e-mails in response to a request from the plaintiff because the defendants "failed to produce the e-mails and attachments in either the form in which they are ordinarily maintained, or in a 'reasonably usable form.'" 586 F. Supp. 2d 1250, 1264 (D. Kan. 2008) (quoting Fed. R. Civ. P. 34(b)(2)(E)(ii). But *White* is a federal district court case from Kansas with no precedential value. Moreover, the court in *White* concluded that the electronic versions of the e-mails were discoverable because the defendants failed to produce the e-mails and attachments in a "reasonably usable form." *Id.* Here, the district court admitted the e-mails in paper form. Powers was able to testify that she did not send the e-mails and that they were fabricated. Therefore, the e-mails were admitted in a "reasonably usable form." Powers has not demonstrated that the district court abused its discretion in denying her request for production of the electronic versions of the e-mails.

B. Telephonic testimony

Powers sought to have a computer-forensics

expert from Texas testify by telephone as to the inherent unreliability of paper copies of e-mails and the ease with which they can be fabricated. Powers also sought to have an audio-forensics expert from Texas testify by telephone that the audio voicemail recordings presented by Freihammer were inconsistent with recordings that are genuine, authentic, and unaltered. The district court excluded the testimony of both experts.

Powers argues that the district court abused its discretion by excluding the telephonic testimony of her experts. We disagree. The Minnesota Rules of Civil Procedure provide that the testimony of witnesses shall be taken orally in open court unless otherwise provided by statute or by the rules. Minn. R. Civ. P. 43.01. Moreover, this court has held that under rule 43.01, telephonic testimony is not a permitted substitute for oral testimony in open court. *In re Bieganowski,* 520 N.W.2d 525, 528 (Minn. App. 1994), *review denied (Minn.* Oct. 27, 1994).

Powers argues that this case is distinguishable from *Bieganowski* because the telephonic testimony in that case concerned a "fact" witness, whereas the testimony at issue here concerns expert witness testimony. Powers argues that in contrast to the testimony of a "fact witness," the "question for the trier of fact with regard to expert witnesses is not whether the expert is telling the truth about facts but rather whether the testimony is scientifically believable."

Powers's argument is without merit. In *Bieganowski,* this court stated: "With telephone testimony, the trier of fact can perceive some of the indicia of credibility, such as tone of voice, but cannot perceive others, such as body language. With in court testimony, the trier of fact can perceive both visual

and aural indicia of credibility." 520 N.W.2d at 528.

Here, the fact that the challenged testimony is that of two expert witnesses is a distinction without a difference. Just as with "fact witnesses," the believability of the expert testimony hinges upon credibility. As this court held in *Bieganowski,* telephonic testimony inhibits the trier of fact's ability to perceive credibility. Therefore, the district court did not abuse its discretion by excluding the telephonic testimony.

C. Alleged recordings of Freihammer

At trial, Powers attempted to introduce the recordings of two conversations purported to be between Powers and Freihammer. In one recording, Freihammer allegedly called Powers "baby," as a term of endearment. In the other recording, Freihammer allegedly told Powers that he was not an honest person. The district court excluded the recordings because they were recorded outside of the time periods claimed in the petition and, therefore, irrelevant.

Powers argues that the district court abused its discretion by excluding the recordings. But the record reflects that the recordings of the two conversations occurred in January and July 2008. Respondents' petition alleged that Powers's harassing conduct occurred during October 2008 through February 2009. Although the recordings may have been relevant to support Powers's claim that Freihammer may have acted inappropriately at certain times before the alleged harassment occurred, they are not relevant in determining whether Powers engaged in harassing behavior under the HRO statute. Therefore, the district court did not abuse its discretion in excluding the recordings.

Affirmed.

/s/_____

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

STATE OF MINNESOTA IN SUPREME COURT

CASE TITLE: *James Freihammer and Calise Freihammer, individually and on behalf of minor children, petitioners, Respondents, vs. Kristina Powers, Appellant*

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

Kristina Powers, Petitioner,

vs. APPELLATE COURT CASE NUMBER: A091562

James Freihammer, et.al., Respondents.

DATE OF FILING OF COURT OF APPEALS DECISION: June 15, 2010

TO: The Supreme Court of the State of Minnesota:

The petitioner, Kristina Powers, requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Did the district court judge have the authority to act as an expert witness on behalf of the Freihammers, while excluding Powers' expert who had a contrary opinion? The court of appeals wrongly ignored the district court judge's misconduct when he declared voicemail recordings contested by Powers to be unaltered instead of merely *excluding* Powers' expert's testimony.

2. Did both the district court judge and Appellate Judge Stauber display further behavior constituting

misconduct when they ruled against Powers on evidence never submitted to the either court? Both judges violated Canon 2, Rule 2.9, paragraph C. of the Minnesota Code of Judicial Conduct which states that a judge "shall consider only the evidence presented" to the court. The district judge ruled that Powers sent multiple emails which he never read and which he did not allow her to read, and Judge Stauber stated *as a fact* on page 6 of the appellate ruling that Powers made three hang-up calls to Freihammer in 2009 when no finding of fact was ever made in the district court and no testimony about them exists in the court transcript record.

3. Did the district court judge display further prejudice by allowing Mr. Freihammer to threaten Powers, call her abusive names, and express his love for her while he had a no-contact HRO in place against *Powers?* This is an example from the district court of further prejudice.

Statement of Criteria: This case essentially presents a question of whether or not judicial misconduct will be affirmed in Minnesota courtrooms. The district court judge in this case displayed complete disregard for the sanctity of his office by acting as an expert witness on behalf of the Freihammers, instead of exercising judicial discretion and merely *excluding* Powers' expert. Canon 3, Rule 3.3 of the Minnesota Code of Judicial Conduct ("Code") prohibits a judge from acting as a character witness on behalf of any party in a court proceeding except when lawfully subpoenaed. Comment [1] of Rule 3.3 states that a judge who acts as a character witness on behalf of one party "abuses the prestige of judicial office to advance the interests of another" and is also in violation of Rule 1.3. It is only that much

worse when a judge goes far beyond the behavior described in Rule 3.3 and acts as an expert witness on behalf of one party in a legal action he is presiding over. It is truly appalling that the court of appeals decision, written by Judge Stauber, would simply ignore this alarming abuse of office by a district court judge and merely affirm all rulings and findings of fact by a judge who displayed extreme prejudice against Powers to the point of violating the Code. Upon inspection of the issues raised against Powers by the Freihammers in their own Appellate Brief, further evidence of gross judicial violation of the Code is found for Canon 2, Rule 2.9, paragraph C. It is further troublesome to find that Judge Stauber stated *as a fact* on page 6 of the appellate ruling that Powers made three hang-up calls to Freihammer in 2009 when no finding of fact or testimony about them exists in the record.

C. Statement of Fact and Procedural History: Powers was employed as a part-time childcare assistant at Wabasha-Kellogg School District ("School District") from the summer of 2006 through December 2008. James Freihammer ("Freihammer") was the Superintendent. After **Powers, age 19,** left her job in December 2008, **Freihammer, age 42,** petitioned the district court for a harassment restraining order ("HRO"). The basis for the HRO petition was Freihammer's allegation that Powers had made unwanted, non-sexual romantic overtures to him, although Freihammer later conceded he never once told Powers she could no longer contact him prior to filing for an HRO. Powers denied Freihammer's allegations and said that **his** inappropriate behavior towards her caused her to quit her job. Freihammer produced paper copies of

emails signed in Powers' name. Powers hired a computer forensic expert and sought discovery of the electronic copies to prove she did not send them. The district court judge denied her request and considered the information irrelevant to his determination of her guilt.

In addition, Freihammer produced two unsigned, handwritten notes; two anonymous faxes; and voicemails recordings Freihammer claimed were from Powers. The faxes both had blank "from" lines with no phone number, said that someone **other than** Powers wrote them, and were without foundation, as the alleged recipient, Respondent Calise Freihammer, never testified. The faxes warned Mrs. Freihammer that her husband might fabricate emails in Powers' name to deceive her. After hearing the alleged voicemails, **Powers testified that the voicemail recordings were in her voice, but Powers contended they had been edited** (HT. 232). Powers sought to have an audio expert from Texas, Barry Dickey, testify by phone that the voicemails showed absolute indications of possible editing/altering. The district court disallowed this testimony and, instead of using judicial discretion to merely *exclude* the expert testimony, became its own expert witness on behalf of the Freihammers by declaring the voicemails to be authentic (HT. 238-241: 319:18-25; 320:1-7). The district court judge also allowed the School Board chairman, John Danckwart, to testify that Powers had allegedly sent him and other, unnamed Board members multiple emails (HT. 249-261), referenced in Freihammer's original HRO petition by accusing Powers of contacting his employer regarding her romantic "fantasy" about Freihammer. The judge denied Powers the ability to see those emails in any

format, citing supposed Minnesota Government Data Practices concerns. Yet, he allowed these emails to be used in court against Powers by counsel for Freihammers. *(see* HT. 203:1-7; 207-208; 227-230). The emails were never submitted to the court and, accordingly, *the judge never read them, either.* **The judge made a finding of fact that Powers sent these emails** (HT. 321:9-15). **The emails were used against Powers in Freihammers' Appellate Brief** (Resp't Resp. p. 33).

Powers produced as Exhibits 11, 12, 13, and 14 several emails signed in Freihammer's name, sent in May 2009 while Freihammers' existing HRO was in place against Powers. Powers was unable to trace the IP addresses on these emails, but the district court ruled, with the court of appeals affirming, that it is not necessary in this case to have electronic backup to prove someone sent an email. *Freihammer has never once denied sending Powers these emails,* which called Powers a "bitch" and"whore," threatened her, and said he loved her. Although the district court ruled that contested paper copies of emails submitted by Freihammer were valid, the judge simply ignored the uncontested emails from Freihammer to Powers that were in the same format (electronically untraceable). The district court granted the HRO and the court of appeals affirmed all actions by the district court judge and used the contents of the contested paper copies of emails against Powers while denying her the right to electronically prove she did not send them.

Argument: In her Brief, p. 22-23, Powers noted that the judge not only excluded the audio expert testimony, but he also said he had listened to the voicemails and that they were not edited, and he gave

this reason as part of why he would not allow that expert to testify for Powers. This was ignored in the court of appeals' decision. In the Freihammers' Appellate Brief, p. 33, the testimony of Chairman Danckwart was used against Powers in support of Freihammers' arguments that Powers harassed Freihammer by sending his employers "several" emails. Although not specifically addressed by the court of appeals, this issue, as noted, was raised on appeal by the Freihammers in their own Brief as an argument against Powers. The district court judge's finding of fact clearly violated Canon 2, Rule 2.9, paragraph C. of the Minnesota Code of Judicial Conduct, which states that a judge "shall consider only the evidence presented" to the court. Here, he made a finding of fact that Powers sent emails that he never even read.

Judge Stauber, on page 6 of the appellate ruling, stated *as a fact* that Powers made three hang-up calls to Freihammer in February 2009. However, the district court transcripts and the district court judge's own ruling show that no finding of fact regarding hang-up calls was ever made and no testimony about them exists. This also violated Canon 2, Rule 2.9, paragraph C.

Powers did not raise the issue of the threatening emails from Freihammer on appeal, as her argument was for electronic proof. However, with both courts ruling the paper copies of emails submitted by Freihammer are valid, an example of extreme prejudice was again displayed against Powers when the district court failed to apply the same standard to her.

Conclusion: These clear and overt violations of Canon 3, Rule 3.3 (and 1.3); and Canon 2, Rule 2.9,

paragraph C. should compel review. The brazen display of judicial misconduct in this case is utterly appalling, and the Court must show the people of this State that, unlike the court of appeals, it will not tolerate the Minnesota judiciary falling into such astonishing disrepute.

By: s/_____

Dated: July 13, 2010

Kristina J. Powers. PRO SE, 67178-155th Avenue, Wabasha, MN, 55981 (651) 565-0089

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT
A09-1562

James Freihammer and Calise Freihammer,
individually and on behalf of minor children,
Respondents,

vs.

Kristina Powers,
Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Kristina Powers for further review be, and the same is, denied.

Dated: August 24, 2010

BY THE COURT:

s/
Lorie S. Gildea
Chief Justice